

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Maltreatment
Determination and Disqualification of
Ramona Pekarek

FIRST PREHEARING ORDER

This matter is before Administrative Law Judge Steve M. Mihalchick on the Department of Human Services' request that notes of an interview of a witness be received in lieu of live testimony of the witness, who is very ill with cancer and unable to appear at the hearing. In addition, Respondent has requested that she be provided unredacted copies of the notes of that interview and unredacted copies of the notes of two other interviews of the witness.

Oral argument on the requests was heard by telephone conference on March 13, 2006. Amber Hawkins, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, appeared on behalf of the Department. Douglas R. Hegg, Hegg Law Office, 2020 Fillmore St, PO Box 37, Alexandria, MN 56308, appeared on behalf of Respondent. At that time, the Administrative Law Judge ordered that both redacted and unredacted copies of the documents be provided for *in camera* review by the Administrative Law Judge. Those copies were provided by the Department on March 13, 2006.

The Administrative Law Judge has conducted an *in camera* review of the redacted and unredacted documents at issue. Based on the arguments of counsel and the record, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. The notes of the February 6, 2004, telephone interview of the witness by her supervisor and another person shall be received at the hearing in lieu of the live testimony of the witness.

2. The Department shall modify the notes of the three interviews of the witness as follows and provide the modified documents to Respondent's counsel:

3. Notes of February 6, 2004, interview: No modifications required.

4. Notes of March 16, 2004 interview: on page 5, reveal the contents of the second and third lines from the bottom of the page.

5. Notes of April 13, 2004 interview:

6. On page 4, reveal the contents of the last two lines.

7. On page 5, reveal the contents of lines 6 through 15.

8. If Respondent chooses, she may offer portions of the notes of the March 16 and April 13, 2004, interviews of the witness by the Department's investigator into evidence.

Dated: March 14, 2006

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Use of Interview Notes

The Department's witness is essentially unavailable. She is receiving chemotherapy and can speak for only a few minutes, even by telephone. The witness had been interviewed by her supervisor over the telephone on February 6, 2004. Another person sat with the supervisor and typed notes of the interview as it proceeded. The Department seeks to offer those notes as evidence and would, if necessary, call a witness by telephone to verify that the notes reflect what she told the supervisor that day.

Respondent objects to the use of the notes as hearsay and a denial of her right to cross-examine witnesses against her. She argues that the questioning by the supervisor was not under oath and did not explore the foundation in details of the allegations, ignore the possible biases of the witness, as cross-examination would.

The notes are hearsay and Respondent does have a right to cross-examine witnesses.¹ However, the Administrative Law Judge "may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the

¹ Minn. R.1400.7100, subp. 1.

conduct of their serious affairs.”² It is impossible to judge the reliability of the notes. At this point it is likewise impossible to determine at this point whether the evidence they contained will be sufficient to meet the Department’s burden of proof on the facts at issue. The notes will be admitted and their value determined in light of the other evidence presented. The witness shall not be called to verify the notes unless she is available for cross-examination.

Discovery of Redacted Data

The identity of individuals who make a report of maltreatment is classified as private data on individuals.³ However, when the protected data would ordinarily be discoverable in the course of a judicial or administrative proceeding, the party seeking disclosure may seek access to the data before the appropriate administrative law judge. The administrative law judge shall first determine whether the data are discoverable, and, if so, “whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy interest of an individual identified in the data.”⁴

In making the decision the administrative law judge shall consider whether notice to the data subject is warranted, and, if so, what type of notice is appropriate.⁵

The discovery standard is liberal:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁶

In this case, the information that Respondent seeks was redacted by the Department because the Department believed it all related to the identity of one or more persons who reported maltreatment. To the extent that is true, the legislative policy of encouraging and protecting reporters of maltreatment of adults expressed in Minn. Stat. § 626.557 outweighs the interest of Respondent in discovering the names of any individuals, including herself, who may or may not have filed maltreatment reports. If the witness filed reports she believed she

² Minn. R.1400.7300, subp. 1; *In the Matter of Barry*, unpublished opinion A04-2481 (Minn. App., January 3, 2006)

³ Minn. Stat. § 626.557, subd. 12b.

⁴ Minn. Stat. § 13.03, subd. 6.

⁵ *Id.*

⁶ Minn. R. Civ. P. 26.02 (a); see also Minn. R. 1400.6700.

was required by law to file, that would only be marginal evidence regarding her credibility. Thus, it is appropriate in this case to allow the Department to redact information that may reveal the identity of reporters of maltreatment.

Some of the redacted information in the three sets of interview notes does not reveal the identity of reporters and, more specifically, does not relate to whether the witness filed any such report. This Order requires the Department to reveal that information

S.M.M.